

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CASE NUMBER: ELRCA/E072/2024

MANPOWER NETWORKS LIMITED VS SAMWEL GARAMA CHARO

JUDGMENT

Background

1. Asserting that the Appellant employed him as a Warehouse Keeper at all material times and that his employment was unfairly terminated, the Respondent sued the Appellant in the trial Court in the case mentioned above, claiming various remedies. After hearing the parties' respective cases, the court, through its judgment dated 30th March 2023, found in favour of the Respondent, declaring that the termination of his employment was unfair, and awarded him all the reliefs he sought in his pleadings.
2. Aggrieved by the Judgment, the Appellant challenged the Judgment through his memorandum of appeal filed herein.
3. Following directions by this Court, the appeal was canvassed by way of written submissions.

The Respondent's Case Before the Trial Court

4. It was the Respondent's case that on or around 1st April 2021, he was employed by the Appellant as a warehouse keeper and/or cleaner on a monthly salary of Kshs. 20,305/-. His duties included cleaning and organising the warehouse, among other responsibilities.
5. On the 20th of May 2022, he reported for work when he had an epileptic fit, which caused him to fall and sustain an injury. His chief supervisor, Mr Shamall, took him to the hospital, where he received treatment and was discharged on the same day.

6. The Doctor recommended that he stay home for 10 days to recover. Once recovered, he returned to work on June 1, 2022. When he resumed his duties, his immediate supervisor, Mr. Isaac, called him to his office and instructed him to return home, as they had granted him five additional days to recover. He took these five days and reported back on June 6, 2022. On that day, after returning to work, the supervisor informed him that due to his epileptic condition and the epileptic episode, the Appellant had decided he could no longer continue working for them.
7. This took him by surprise. The Appellant's action was unilateral and inconsiderate/unfair. He reported the matter to the Labour offices, which office was kind enough to write on his behalf, demanding his dues. Despite receipt of the letter, the Appellant ignored, neglected and/or refused to respond to the same.
8. He asserted that the said termination was discriminatory, unfair and contrary to the dictates of procedural fairness.
9. He contended that by reason of the premises, he was entitled to compensation for unfair termination; compensation for earned but unutilised leave days, and one month's salary in lieu of notice.

The Appellant's Case before the trial Court

10. The Appellant presented one witness, EDWIN SHAMALLA, the Operations Coordinator at Tata Chemicals Magadi Mombasa worksite, who testified on their behalf.
11. He stated that the Respondent entered into a valid and duly executed contract of employment with the Appellant for a period of five (5) months commencing 1st April, 2021, and ending on 31st August 2021, as a warehouse keeper and/or cleaner, which contract lapsed and the claimant was paid all his dues.
12. On or about the 1st day of September, 2021, the Respondent entered into a new employment contract with the Appellant for a period of nine months ending 31st May, 2022, in the same position as a housekeeper.
13. He testified that the Respondent was initially an employee of Cyka Manpower Services. Following an arrangement between this company and the Appellant, the Appellant took over, among other things, the employees of the former company. As such, the Appellant never initially recruited the

Respondent, and therefore did not know his health status. He deliberately did not disclose to the company that he was suffering from epilepsy. Had he disclosed this at the time of employment, they would have assigned him duties in a more suitable environment where he would not be constantly at risk in the event of an epileptic attack.

14. The Appellant learnt of the health status of the Respondent sometime in May 2022, when he had an epileptic attack, which led to his injury at work. Following the attack, he was taken to the hospital, where he was treated. Acting on the doctor's recommendations and advice to stay home for ten (10) days to recuperate, the company treated the ten (10) days off as sick leave.
15. Therefore, by the time he reported back to work on 1st June 2022, after his sick leave, his contract had already expired. As a result, the management did not expect him to return, even if he had no health issues, unless a new contract had been entered into, as had been the case previously.
16. The Appellant company decided not to take him up for any further contract, as the work environment would be very harsh and dangerous for him. Furthermore, the company did not have a placement for him at the time. The Respondent was not discriminated against in any way. His contract lapsed, and he was paid all his dues. The Appellant had no obligation to take him back, having paid his salary for May.

The Judgment by the Trial Court

17. After hearing the parties on their respective cases, the learned trial Magistrate found that the Respondent proved his claim for unfair termination of employment. She held that the termination was both procedurally and substantively unfair. She awarded him a sum of KShs—278,178.50 as terminal dues, costs of the suit, and interest at commercial rates.

The Appeal

18. Dissatisfied with the Judgment of the Learned Magistrate, the Appellant challenged it through this appeal, raising the following grounds:
 - a. That the learned trial Magistrate erred in Law and Fact in finding that the Appellant discriminated against the Respondent.
 - b. That the learned trial Magistrate erred in Law and Fact in finding that the Appellant had unlawfully and unfairly terminated the Respondent's employment.
 - c. That the learned trial Magistrate was biased in totally disregarding the Appellant's weight of evidence and submissions, thereby arriving at the wrong decision.

- d. That the learned trial Magistrate erred in Law and Fact in awarding the Respondent terminal and contractual dues of Kshs.278,178.50/-.
- e. That the learned trial Magistrate erred in Law and Fact in awarding the Respondent interest on costs, terminal and contractual dues, at commercial rates.
- f. That the learned trial Magistrate erred in Law and Fact in disregarding the principles governing redress of violations of fundamental rights and freedoms, and to observe the doctrine of stare decisis in determining the suit before the court.
- g. That the learned trial Magistrate erred in Law and Fact in failing to consider the appellant's compassionate actions and mitigating factors, during the time of the Respondent's attack and diagnosis, that is, ensuring that he accessed treatment and medication and days for recuperation.

Analysis and Determination

19. I have carefully considered the grounds of appeal, the material that was placed before the learned trial Magistrate and the submissions filed by the parties, and conclude that the Appellant's appeal herein revolves around four broad issues, thus:

- I. Under what form of contract of employment was the serving at all material times?
- II. Whether the termination was at the initiative of the Appellant.
- III. Whether the termination of the Claimant's employment was fair.
- IV. Whether the Claimant is entitled to the reliefs sought.

Of the form of employment contract

20. Where, in a dispute regarding termination of an employee's employment, there is no agreement concerning the nature of the employee's employment contract at the material time, it becomes imperative that the Court, faced with the task of resolving the controversy, resolves the issue definitively. In an employment dispute like the instant one, the nature of the contract determines the provisions and principles of law that the Court would apply in assessing the fairness or otherwise of the termination. It would also inform the reliefs to be granted if the claim succeeds.

21. The Appellant's pleadings and evidence before the trial Court, in my view, suggest that the Respondent's employment was under a fixed-term contract, which expired by effluxion of time. The Respondent's position was that he was employed under an indefinite contract that could only be lawfully and fairly terminated in accordance with the provisions of sections 41, 43, and 45 of the Employment Act.

22. The learned trial Magistrate did not make a clear and conclusive decision on this crucial issue.

The Appellant submitted two employment contracts to the trial Court—the first, dated 1st April 2021. This contract did not specify a particular expiry date. Contrary to the Appellant’s claim that it was a fixed-term contract for three months, the three months mentioned in the document refer to a probationary period.

23. The second agreement is dated 1st September 2021 to 31st May 2022. In his testimony in Court, the Respondent firmly asserted that he did not sign the two contracts.
24. This Court notes that, determined to prove she did not execute the two contracts, the Respondent subjected various documents, including the contracts, to forensic examination by a handwriting expert. Under a further list of documents dated 1st March 2023, the Government Forensic Document Examiner’s report dated 11th October 2022 was presented to the Court. Inspector E.J. Mwangi testified and produced the documents as evidence. The key finding of the report, as reiterated by the Inspector in his testimony, was that the signatures on the contract documents were not those of the Respondent.
25. I note that the Appellant’s witness in his evidence under cross-examination admitted to the aspect of forgery.
26. The Appellant’s position was anchored on the documents, documents which were eventually found to be forgeries. The Court cannot accept a position founded on illegality and or illegal documents as a true position of a matter. It would be unjust and unconscionable. The party presenting such a position and/or documents can seldom be considered a trustworthy party.
27. Blurred by their reliance on the illegal, forged documents, the Appellant did not, in any manner or sufficiently, discount the Respondent’s position that his contract of service was indefinite.
28. In the upshot, I come to the inevitable conclusion that the Respondent’s contract of employment was not a fixed-term contract but indefinite.

Whether the Respondent’s employment was terminated at the initiative of the Appellant

29. In his pleadings and evidence before the trial Court, the Respondent explained in detail how the termination of his employment occurred. Having held as I have hereinabove, I hold that the explanation was not discounted in any manner by the Appellant. Consequently, this Court has no

basis upon which it can disturb the trial Court's finding that the termination was at the initiative of the Appellant.

Whether the termination of the Respondent's employment was unfair

30. Section 43 of the Employment Act 2007 requires the employer in a dispute over the termination of an employee's contract to prove the reason for the termination. Where the employer fails to do so, the termination shall be deemed unfair by operation of law, pursuant to Section 45 of the Act.
31. The Act imposes an additional duty on the employer under Section 45 of the Employment Act to demonstrate that the reasons were fair and valid. It is possible, therefore, that the employer can discharge their burden under Section 43 of the Act; however, the termination may still be deemed unfair if they do not demonstrate that the reason for the termination was legitimate.
32. Under Section 41 of the Employment Act, any employer contemplating terminating an employee's employment must conform to the procedure embodied therein. The procedure is mandatory. The employer must notify the employee of their intention and the reasons thereof. They must accord the employee an adequate opportunity to prepare and make a representation on the reasons. Lastly, the employer must consider the representations before making a final decision.
33. The duty to prove that there was compliance with the dictates of procedural fairness falls on the employer.
34. Elaborating on the employer's legal burden under the provisions stated above, the Court of Appeal aptly captured it in the case of Pius Machafu Isundu vs Lavington Security Guards Limited [2017] KECA 225 [eKLR], thus;
"There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on the employer in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/ dismissal [section 43]; prove the reasons are valid and fair [section 45]; prove that the grounds are justified [section 47[5], among other provisions. A mandatory and elaborate process is then established under Section 41, requiring notification and a hearing prior to termination." 35. Considering this Court's finding that the Respondent's contract of service was not fixed-term in nature, and that it was terminated at the initiative of the Appellant, I have carefully considered the learned trial Magistrate's analysis of the

applicable provisions of the law and as they related to the matter before her, and conclude that the analysis was proper.

Of the reliefs granted

36. The Kshs. 278,178.50, the learned trial Magistrate awarded to the Respondent was one month's salary in lieu of notice [Kshs. 20,305], and compensation for earned but not utilised leave days [Kshs. 14,213.5], and compensation for unfair termination of his employment [Kshs. 243,660]. The Respondent's employment was terminable by a twenty-eight-day notice under Section 35 of the Employment Act. Undeniably, the termination of the Respondent's employment was without any notice. He was entitled to notice pay under Section 36. The learned trial Magistrate did not err in awarding the relief.

37. Section 49[1][c] of the Employment Act confers on the courts the authority to award damages to an employee who has successfully challenged their employer's decision to terminate their employment unfairly. However, it is essential to note that this power is discretionary and is applied on a case-by-case basis. Section 49 specifies the factors to be considered when exercising this discretion. When discretion is exercised, the reasons for it must be disclosed. The learned trial Magistrate did not provide reasons for the manner in which she exercised her discretion.

38. This is not to say that she erred in making the award. I have carefully considered the manner in which the Respondent's employment was terminated, which may amount to a dismissal on the grounds prohibited under Section 46 of the Employment Act, the lack of adherence to procedural and substantive fairness, the length of the Respondent's service, and the fact that the Appellant was dishonest in most respects to the trial Court, and conclude that the learned trial did not err in awarding the compensation under Section 49[1][c], to the extent she did.

39. An award of interest is discretionary. Where a Court does not award interest at the traditional court rates, but at a compound, commercial or other interest rate, reasons must be given for the divergence. The learned trial Magistrate did not set out in her judgment the reasons why she awarded interest at a commercial rate [rate which in any event she did not specify]. I am of the view that, in the circumstances of the matter, she did not have any justification. This is the only aspect of the lower court's Judgment I disturb. Interest rates on the sum awarded by the trial Court shall be at court rates from the date of its Judgment till full payment.

40. In the upshot, I find the Appellant's appeal herein lacking in merit. It is hereby dismissed with costs.

READ, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2025

**SIGNED BY/FOR:
HON. MR. JUSTICE OCHARO KEBIRA**